IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 16TH JANUARY 2007 / 26TH PAUSHA 1928

WP(C).No. 32345 of 2006(A)

PETITIONER:

M/S. GEO-TECH CONSTRUCTION CO. (P) LTD.,
KSHB OFFICE COMPLEX, 8TH FLOOR,
PANAMPILLY NAGAR, KOCHI-682 036,
REPRESENTED BY THE DIRECTOR, D.L.N.RAO.

BY ADV. SRI.K.L.VARGHESE

RESPONDENTS:

1. THE COCHIN PORT TRUST,
KOCHI-682 009, REPRESENTED BY THE SECRETARY.

2. THE CHIEF ENGINEER,
COCHIN PORT TRUST, KOCHI-682 009.

BY ADV. SRI.ANTONY DOMINIC
SRI.A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.A.K.JAYASANKAR NAMBIAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 16/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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W.P.(C)No.32345 Of 2006

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Dated this the 16th day of January, 2007.

J U D G M E N T

The second respondent on behalf of the first respondent issued Ext.P1 tender notice for the work of "Reconstruction of Mattancherry Wharf for 250m length" with a probable amount of contract estimated at Rs.5094 lakhs, fixing earnest money to be deposited at Rs.51 lakhs. Among other things, Ext.P1 tender document provided that if the tender is by joint venture/consortium, certain documents as prescribed in the tender notice have to accompany the tender. It also provided that if the tender is by joint venture company/consortium of companies, the experience will have to be determined in terms of Clause 4.5.1.(i)c of Ext.P1 and as regards financial turn over, in the case of joint venture company/consortium of companies, the criteria were fixed in Clause 4.5.1(ii) c.

2. The petitioner M/s. Geo Tech Construction Company Private Ltd. submitted tender along with Ext.P3 covering letter, as also Ext.P2, a joint venture agreement and Ext.P4 guarantee.

3. In the Special Meeting held on 31.10.06, the board of trustees of the 1st respondent, as per Resolution No. 66, decided to discharge the tenders following Ext.P1. Such decision was taken after the 2nd respondent Chief Engineer explained to the Board-1st respondent that two out of the five tenders received were disqualified. It was noticed that both the disqualified tenderers are joint ventures. That resolution, a copy of which is produced along with a memo dated 18.12.06 filed by the counsel for the respondents, would show that the tender submitted by the joint venture of the petitioner along with M/s. Geo Foundations, Kochi was held to be not acceptable. The board took into consideration views of Sri. Haneef, a trustee, that there were contradictory legal opinions regarding the two joint venture firms and that if the board goes ahead with the tenders of the remaining tenderers, that may lead to litigations. The board

accordingly resolved to discharge the tenders and to go for re–tendering.

4. Pursuant to that, Ext.P12 notice, inviting tenders, was issued from the office of the 2nd respondent.

5. There are certain cardinal differences between the terms of Exts.P1 and P2. The joint ventures/consortiums have been totally excluded by the terms of Ext.P12 and the earnest money deposit for the work, which was fixed at Rs.51 lakhs as per Ext.P1 was slashed to Rs.5 lakhs.

6. This writ petition is filed challenging the decision of the board to cancel Ext.P1 tender notification and for a direction to the respondents to consider the tender submitted by the petitioner and other tenderers, on the basis of Ext.P1 tender notification. Alternatively, Ext.P12 is sought to be quashed, in so far as it includes a decision to exclude joint ventures/consortiums from tendering. A direction is sought, to

restore the provisions in Ext.P1 tender as regards entitlement of joint ventures/consortiums.

7. In the back drop of the decision contained in the aforesaid Resolution No.66 which was on record when this matter was heard on the stage of admission on 19.12.06, it was noticed that the question as to the rejection of the tender submitted on the basis of Ext.P1 tender notice, would not survive the decision of the 1st respondent's board to discharge the tenders and to go for re-tendering. However, it was then noticed that there may be a case for the petitioner on account of the exclusion of joint ventures/consortiums from the field of choice and that it was not then shown that the board had deliberated upon and taken the decision to exclude the joint ventures/consortiums from the field of choice. It was accordingly that the writ petition was admitted and an inter-locutory order was passed, resulting in deferring the opening of tenders in terms of Ext.P12.

8. After the aforesaid order dated 19.12.06, was issued, an additional counter affidavit has been placed on record by the respondents. A reply affidavit to that additional counter affidavit is also on record. These pleadings are in addition to the counter affidavit filed at the stage of admission as also an additional affidavit filed by the writ petitioner. As already noticed, resolution No.66 was brought on record along with the memo of counsel for the respondents as directed by the Court.

9. Following the views at the stage of admission, that the rejection of the tender of the petitioner does not survive for consideration in view of the discharge of Ext.P1 tender and the decision of the board to go for re-tendering, no issue relating to that question was urged at the time of final hearing and the submissions at the bar were confined to the sustainability of the terms of Ext.P12 tender notice. It is the assertion of the 2nd respondent in the additional counter affidavit that the Chief Engineer is empowered to modify the tender conditions and that the decision to exclude the joint ventures was taken by him. He

also states that he had obtained the sanction of the Chairman of the 1st respondent, though not required.

10. The first question arises for decision is as to whether the 2nd respondent is competent to issue Ext.P12 varying the terms of Ext.P1.

11. The 1st respondent is governed by the provisions of the Major Port Trusts Act,1963 (hereinafter referred to as the 'Act'). Sections 33 and 34 of that Act read as follows:

> "33. **Contracts by Board**.- Subject to the provisions of section 34, a Board shall be competent to enter into and perform any contract necessary for the performance of its functions under this Act.
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> 34. **Mode of executing contracts on behalf of Board.-** (1) Every contract shall**,** on behalf of a Board, be made by the Chairman or by any such officer of the Board not below the rank of the Head of a Department as the Chairman may, by general or special order, authorise in this behalf and shall be sealed with the common seal of the Board:

> Provided that no contract whereof the value or amount exceeds such value or amount as the Central Government may from time to time fix in this behalf shall be made unless it has been previously approved by the Board:
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> Provided further that no contract for the acquisition or sale of immovable property or for the lease of any such property for a term exceeding thirty years, and no other contract whereof the value or amount exceeds such value or amount as the Central Government may from time to time fix in this behalf, shall be made unless it has been previously approved by the Central Government.
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> (2) Subject to the provisions of sub-section (1), the form and manner in which any contract shall be made under this Act shall be such as may be prescribed by regulations made in this behalf.
>
> (3) No contract which is not made in accordance with the provisions of this Act and the regulations made thereunder shall be binding on the Board."

12. Going by the additional counter affidavit, the first respondent complies with an instruction manual and a bunch of procedures in relation to its civil engineering works. The

procedures which applied at the relevant time are those included in the Departmental Quality Manual, which show that the Chief Engineer is the head of the Civil Engineering Department, which is one of the departments, dealing with core subjects directly connected with the corporate objective of the Port. The principal activity of this department is planning, design and execution of the development of Port infrastructures like Land area, Berthing structures, Navigational channels, Storage sheds, Storage area, Roads and Bridge connection and Office and Residential buildings. Maintenance and repairs required for the upkeep of these structures are executed by this department. It further shows that the Chief Engineer has the over all technical and administrative control of the department. The duties and responsibilities of the Chief Engineer, among other things, are:

- Assisting the Chairman and Dy.Chairman in the functioning of the organisation.
- Effective implementation and review of all new projects under control.

- Maintenance and development of general conservancy(Civil Engineering) of the Port.
- Sanitation of Port area and water supply and maintenance of hygiene.
- Preparation of estimates of new works and award of contract.

13. The award of contracts is thus a matter within the duties and responsibilities of the Chief Engineer. The procedure regarding preparation of tender documents shows that the Chief Engineer is responsible for that procedure and its subsequent revisions. The Chief Engineer is responsible for the evaluations of tenders under two cover system and concluding contract.

14. It is apparent from the said Procedures and Instruction Manual that detailed instructions pertaining to pre-qualification of tenderers and execution of major project works are not included either under the Procedures or Instruction Manual. This is also so stated in the Preface of the Instruction Manual, which is

Ext.R1(e). The reason for the non-inclusion of such matters under the procedures or instruction manual is, as stated in Ext.R1(e), that these are not frequently and regularly occurring activity and they are of special nature. It is also stated that, as such, the procedures for these two items shall be prepared on case to case basis and approved by the Chief Engineer for implementation.

15. Learned counsel for the petitioner urged that Ext.R1(e) is only the preface to the Instruction Manual and cannot therefore be treated as part of the Instruction Manual. He further contended that the preface is issued by the Chief Engineer and to act on Ext.R1(e), is to assume that the Chief Engineer gave unto himself the power to do matters, as are noticed in the said preface to the Instruction Manual. Ext.R1(e) is, no doubt, the preface to the Instruction Manual. But the statements contained therein are statements of facts. There is no contra material to hold that either the Procedures or the Instruction Manual contains a preface in relation to the execution of major project

works. So much so, it can be safely acted upon to hold that the Procedures or Instruction Manual are not intended to be applied in relation to pre-qualification of tenderers and execution of major project works.

16. As already noticed, the Chief Engineer is the head of the Civil Engineering Department. Chief Engineer is the authority for prescribing the terms and conditions of the tender. This is clear from the fact that Ext.P1, on the basis of which the petitioner had quoted, was also a tender notice issued by the Chief Engineer. Therefore, the Chief Engineer is the authority to formulate the tender documents, including its terms.

17. The question that next arises is as to whether exclusion of joint ventures while issuing Ext.P12 tender notice requires to be interfered with. The 2nd respondent in his additional counter affidavit has stated thus:

> "After the discharge of Ext.P1 tender, the matter was considered by me and on a review of the Tender Conditions, I felt that Joint Venture Tenderers were not desirable for the reason that, such work is only that of a single work of construction of wharf and not a composite work requiring different specilisation and merger of resources. I considered it advantageous to the Port to have an individual, company or partnership as the tenderer and to permit Joint Ventures when composite works requiring specilisation in various fields is to be executed. It was on account of this that, I decided to delete the provision relating to Joint Ventures while issuing Ext.P12 notice inviting tenders. Normally, large, established firms would bring in better and more modern technology. Though, not required, I also obtained sanction of the Chairman of the Port Trust for this purpose."

18. When the 1st respondent enters into contract with joint ventures, contractual rights may, at least, at times, call for tri-partite or multi-party liaisoning during the course of execution of the work. As can be seen from the tender documents that the petitioner submitted following Ext.P1, the joint venture which was entered into by it, was one where the sharing of the funds were the basic criteria. There may be instances where the sharing of knowledge and technology would be relevant. Certain

works may also call for intervention of specialties, to attain the desired result. Hence, all these are matters which would fall within the expertise of those empowered to act on behalf of the contracting parties. In his additional counter affidavit, the 2nd respondent states that different specilisations and merger of resources are not required, having regard to the nature of the work. So much so, I am not inclined to take the view that the situation in hand warrants interference in judicial review. This is particularly because, the decision for formulating Ext.P12 in the manner which it is, is spelt out in paragraph 6 of the additional counter affidavit, as quoted above. That is not a matter on which any intending tenderer was entitled to a pre-decisional hearing. So much so, the reason and rationale of the 2nd respondent's view to exclude joint ventures do not require to be interfered with, in judicial review. The procedure adopted is fair and transparent.

19. In **Tata Cellular** v.**Union of India** (1994(6) SCC 651), the Apex Court laid down that the court has to confine itself to the

question of illegality and the scope of enquiry in relation to judicial review of such matters ought to be only to ascertain whether a decision-making authority has exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable tribunal would have reached or has abused its powers. It is not within the province of the court to determine the fairness of a policy. In the case in hand, it cannot be held that the 2nd respondent did not have the power to formulate the terms of Ext.P12 tender notice or that any error of law was committed. No question of breach of rules of natural justice arises. Plea and proof of abuse of power is scant. The decision of the 2nd respondent to exclude joint ventures from the field of choice, going by the reasons stated in the additional counter affidavit, cannot be treated unreasonable, perverse or irrational. This would be the result of an examination of the facts of this case on the basis of the law laid also in **Reliance Airport Developers Pvt.Ltd.**v.**Airport Authority of India** (JT 2006(10) SC 424).

20. Yet another aspect that arises is that Earnest Money Deposit has been reduced from Rs.51 lakhs to Rs.5 lakhs. Having found that joint ventures cannot assert a right to be considered in terms of Ext.P12, the petitioner who does not aspire to bid except as a joint venture, cannot be heard to make out any case on the fixation of the earnest money deposit . Be that as it may, the counter affidavits on record state that there is a general decision to slash the earnest money deposit to facilitate more participation. Learned counsel for the writ petitioner urged that this contention has to fail on the teeth of the stand that by excluding joint ventures, major bidders will be brought into the fray. But this again is not a matter which is justiciable, since the financial implication of such an exercise is not shown to be against public interest.

In the result, the writ petition fails and the same is accordingly dismissed. No costs.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

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